Acquisition Reform: All Sail and No Rudder[1]

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At a recent seminar on acquisition reform, the acquisition process was described as being in a state of "chaos." That overstates the situation, but not by much. As the people in the acquisition business are painfully aware, in recent years acquisition efforts and the acquisition process have been buffeted by profound, nearly constant disruption.

The principal cause of the disruption is that there is no overarching commitment to *constancy* in acquisition. In fact, the reverse is true. The commitment is to *constant change*. In the words of the reformers' rhyming soundbite, the commitment is to "make reform the norm." [2]

As a consequence, acquisition professionals are now trying to get their work done in the middle of a storm of change—"storm of reform," if you will. In rapid succession we have had the National Performance Review in 1993,[3] the Federal Acquisition Streamlining Act of 1994,[4] the Federal Acquisition Reform Act of 1996,[5] the Information Technology Management Reform Act of 1996,[6] the Defense Management Initiative in 1997,[7] and myriad regulations, circulars, "Thrusts," "Cardinal Points," and "Lightning Bolts." These have generated successive, powerful waves of change that wash up against every person, every project, and every product on the acquisition firmament.

Are these constant waves of change bad? Well, it is difficult to maintain a firm footing in an environment in which the rules are changing faster than people can learn them. It is even more difficult to maintain a steady course. The underlying problem is that acquisition reform is "all sail and no rudder." It scuds along at an impressive pace, but only in whatever direction the wind is blowing at the time. It travels significant distances relative to where it was a week, a month, or a year ago, but it makes no headway against the wind and it does not seem to draw appreciably nearer to any destination.

Measuring Results as an Acquisition Reform

Is it a fair criticism to say that acquisition reform is all sail and no rudder? We should not have to ask. We should already know. We should already have measured where the acquisition process *was* and where it now *is*. We should *know* if we are making progress, if we are coming nearer to acquisition reform's announced goals.

Paraphrasing Professor Bill Kovacic,[8] the 1990's reforms are premised on the recognition that unique and burdensome defense regulations have substantial costs. They discourage entry of leading civilian sector suppliers into the defense sector. They impose substantial costs on suppliers already in the defense sector.[9] These Department of Defense (DOD) mandates impede use of the best civilian practices and, thereby, adversely affect the quality of procurements.

When the recent spate of reforms was initiated, their stated goal was reversal of those effects. Accordingly, we should be able to, and it would be fair to, evaluate the effectiveness of the recent reforms by measuring our progress in reversing those effects or at least drawing nearer to that goal.

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1. Based on remarks presented during the Contract Law Symposium at The Judge Advocate General's School, Charlottesville, Virginia in December 1997 by Ross W. Branstetter, Senior Counsel, Miller & Chevalier, Chtd., Washington, D.C. (rbranstetter@milchev.com).

2. *See* DOD Roundtable on Acquisition Reform, Wash., D.C. (Mar. 31, 1997) [hereinafter Roundtable]. A transcript of the roundtable discussions is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

3. Al Gore, Report of National Performance Review (7 Sept. 1993).

4. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

5. Pub. L. No. 104-106, 110 Stat. 679 (1996). The Federal Acquisition Reform Act of 1996 and the Information Technology Management Reform Act of 1996 were renamed the Clinger-Cohen Act of 1996.

6. *Id.*

7. William S. Cohen, Defense Reform Initiative Report (Nov. 1997). The report is available on the internet at <http://www.defenselink.mil/pubs/dodreform/>.

8. *See* William E. Kovacic, *Evaluating the Effects of Procurement Reform on Defense Acquisition,* 33 Procurement Law. 2 (1998).

9. The DOD's regulations add an average increase in cost of about 18 percent, according to a study commissioned by then Deputy Secretary of Defense Perry. *See The DOD Regulatory Cost Premium: A Quantitative Analysis,* Coopers & Lybrand/TASC (Dec. 1994).

Again borrowing heavily from Professor Kovacic,[10] the following questions should already have been asked and answered: (a) What has been the effect of the 1990's reforms on migration of firms from the commercial sector into the defense sector? (b) Have these reforms induced contractors to unify their commercial and defense operations? (c) Have these reforms reduced contractors' costs of complying with defense regulations across the "portfolio" of government contracts? If the answer to those questions is, "We don't know," okay, but someone should at least stand up and say so.

Have these reforms improved procurement outcomes? We think we know the answer to that question, at least with regard to the "acquisition reform success stories" that have been collected and touted. However, the foregoing questions should be asked not only about the procurements which have been selected as success stories, but across the spectrum of procurements, so that we can determine objectively the impact of acquisition reform on the entire portfolio of federal contracts. Success stories are appropriate to encourage and to reinforce innovation by lauding achievements in specific contracts, but success stories are, by themselves at least, an inadequate basis for measuring the impact of reform efforts on the contracting process as a whole.

Somebody said, "what gets measured, gets done." Perhaps so, but there appears to be little enthusiasm for measuring acquisition reform. One DOD leader was candid in saying he "stiff-arms" requests for such measurements.[11] In his view, the people who want such measurements "are busy as hell coming up with just a fairly mediocre or maybe, in some cases, meaningless metric."[12]

This stiff-arming of objective assessment is directly contrary to the best practice in other government reforms, where measurements are not only embraced, they are the drivers of reform.

In restructuring public education, for example, schools are given greater autonomy, but they are held accountable for producing proven results—a policy referred to as "assessment-driven reform."[13] In that vein, reform that avoids measurement could be called "accountability-free" or "results-immaterial" reform.

Whatever the reasoning in resisting metrics, to date, the measurements that have been undertaken do not appear to have reached a consensus that the 1990's reforms have achieved cost savings. The DOD reports that its special pilot programs have achieved significant savings. However, a General Accounting Office (GAO) review of a portfolio of more than thirty of the top touted programs disclosed a net increase, not a decrease, in program costs overall.[14] The bottom line is: we cannot agree that we have saved, or will save, money as a result of acquisition reform.[15] Which means it may be the case that acquisition reform has not saved, and may not save, *any* money.

If we do not know how much the recent acquisition reforms have saved, do we at least know what they have cost? Apparently not. It is clear that there has been a cost and that it has been substantial, but how much the current reform efforts have cost remains unknown.

A virtual industry has been created, the entire purpose of which is "acquisition reform." There are now thousands, if not tens of thousands, of people for whom a prime component of their jobs is reengineering the acquisition process.[16] For example, "the level of participation in [the 1997] Acquisition Reform Week was very extensive. About 100,000 people were actively involved."[17] Senior leaders in the White House and the Pentagon participated. Electronic chat rooms and virtual town halls were set up on the internet and by telephone. What was the *product* of all of that effort? What did it cost? Was it worth it?

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10. *See* Kovacic, *supra* note 8.

11. Roundtable, *supra* note 2 (remarks attributed to Mr. Arthur L. Money, Assistant Secretary of the Air Force for Research, Development, & Acquisition).

12. *Id.*

13. David Bechtel, Using Alternative Assessments to Hold Schools Accountable 1 (1996) (unpublished manuscript, on file at the Univ. of Pittsburgh library).

14. The GAO analyzed 33 of 63 programs (eliminating procurements that were classified, etc.) for which the DOD reported that cost decreased as a result of acquisition reform. The GAO concluded that "the cost of the programs increased, on average, by about 2 percent, after adjusting for quantity changes and inflation." *Acquisition Reform: Effect On Weapon System Funding,* GAO/NSIAD-98-31, Oct. 1997, at 5.

15. *Acquisition Reform: DOD Faces Challenges in Reducing Oversight Costs,* GAO/NSIAD-97-48, Jan. 1997, at 13 (reporting that "the amount of cost reduction that can actually be achieved from oversight reforms remains in question"); *Acquisition Reform: Effect on Weapon System Funding,* GAO/NSIAD-98-31, Oct. 1997, at 2 ("[O]ur review raises concerns about the extent to which cost reductions from acquisition reform that the services have reported will be available . . . ."); Vice Admiral John J. Shanahan, Center for Defense Information, presentation to the DOD's National Defense Panel (29 Apr. 1997) ("Acquisition reform has been underway for some years, but the returns to date have been disappointing and do not look as if they will come anywhere near the Defense Science Board projections.").

16. For example, the GAO reported that, as of 1996, the federal government had created 185 "reinvention laboratories." *Management Reform: Status of Agency Reinvention Lab Efforts,* GAO/GGD-96-69, Mar. 1996. Reinvention entities continue to be created. *See, e.g.,* Memorandum, Secretary of Defense, subject: Achieving National Performance Review Defense Acquisition Reinvention Impact Center Goals by Year 2000 (Nov. 22, 1997) [hereinafter National Performance Review Memo] ("The Department of Defense Acquisition [sic] has been designated a National Performance Review Reinvention Impact Center.").

17. Roundtable, *supra* note 2 (remarks attributed to Dr. Paul G. Kaminski, then Under Secretary of Defense for Acquisition & Technology).

If you measure the benefits of acquisition reform by the number of people caught up in it, acquisition reform is a success. On the other hand, if you measure the recent acquisition reforms by comparing the tangible benefits they have produced with the costs we collectively have had to pay, the jury is still out.

There has been a lot of discussion about the tremendous financial pressures caused by reductions in federal procurement budgets[18] and about how important it is to eliminate expenditures that do not provide a net contribution to our procurement effort. If the 100,000 people "actively involved"[19] in Acquisition Reform Week devoted just *one-tenth* of their time to that activity, that translated into *10,000* "manweeks." That would mean *200 years* of effort, time, and money were devoted to that single activity. Before we invest *more* effort, time, and money in acquisition reform, we should find out what has been the cost of, and the return on, our investment thus far.[20]

Pressuring Managers as an Acquisition Reform

Given the absence of measurement to confirm that recent acquisition reforms have produced a real benefit,[21] it is not surprising that there are some people who are skeptical about the reforms. However, it *is* surprising that experienced acquisition middle managers have been singled out for criticism by their leaders, because they are skeptical. In explaining resistance to acquisition reform, one DOD leader attributed it to an "hourglass effect," described as follows: the people at the top want acquisition reform and the people at the bottom want acquisition reform. "*The problem is in the middle*. It's people who have been around for ten or fifteen years. They've seen other kinds of acquisition reform come and go."[22] The people referred to as the problem are middle managers who are skeptical about the current deluge of reforms.

Individual managers may or may not be a problem, but an organizational culture that stifles expression of divergent professional opinions is definitely a problem. A 1996 GAO report regarding acquisitions by the Federal Aviation Administration (FAA) found cost increases up to 500 percent and schedule overruns that averaged almost four years,[23] and the report concluded that the FAA's "culture" was a primary cause of the overruns.[24] Specifically, according to the GAO's report, the culture at the FAA pressured its acquisition professionals to suppress bad news.[25] We should not go down that same road.

Why is the fact that a middle manager has "seen other kinds of acquisition reform come and go" a ground for criticism anyway? Why is "skepticism" regarding the current spate of reforms a ground for criticism? We all saw acquisition reforms come and go. We lived through them, and, in looking back, we know that not all of the ideas were good ideas (fixed-price R&D contracting, for example).

There is ample reason for caution among those in the middle of the hourglass. They are charged with the responsibility for prudent use of scarce resources, and their experience shows that effort invested in reforms is not always a wise investment. They would be derelict in the discharge of their duties if they did not consider these facts when allocating resources and directing their subordinates.

One theme of acquisition reform is that "if people do something new and it does not work out, they will not be criticized."[26] But the fact that middle managers are being criticized by their leaders is evidence that such forbearance is not extended to them—at least not to the skeptics. Indeed, in the DOD it has been suggested that the way to deal with resistance to acquisition reform is to build pressure on the middle managers in order to "widen the neck" of the hourglass.

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18. *Defense Contract Management,* GAO/HR-97-4, Feb. 1997 ("[b]etween fiscal year[s] 1991 and 1995, the defense procurement budget was reduced by almost 40 percent"); William S. Cohen, Report of the Quadrennial Defense Review 1 (May 1997) [hereinafter QDR] ("[s]ince 1985, America has . . . reduc[ed] its defense budget by some 38 percent, its force structure by 33 percent, and its procurement programs by 63 percent"). The QDR is available on the internet at <http://www.defenselink.mil/pubs/qdr>.

19. Roundtable, *supra* note 2.

20. The next Acquisition Reform Week is scheduled for 4-8 May 1998. Minutes from the Acquisition Reform Senior Steering Group Meeting, Sept. 9, 1997.

21. *See* Lightning Bolt #8 Update, U.S. Air Force (Aug. 1995) ("[I]t was not possible, in most cases, to identify direct, timely measures of acquisition reform progress in terms of cost and schedule.").

22. Roundtable, *supra* note 2 (remarks attributed to Mr. John W. Douglass, Assistant Secretary of the Navy for Research, Development, & Acquisition) (emphasis added). *See id.* (remarks attributed to Dr. Kaminski).

23. *Aviation Acquisition: A Comprehensive Strategy Is Needed for Culture Change at FAA,* GAO/RCED-96-159, Aug. 1996, at 15-16.

24. *Id.* at 22.

25. *Id.* at 5, 22-25 ("personnel [were] expected to do what they [were] told without challenge;" a majority of employees "were concerned about the consequences of reporting bad news;" and "program officials . . . suppressed bad news").

26. *See* Roundtable, *supra* note 2 (remarks by Mr. Douglass).

The suggestion that middle managers should be pressured to overcome their resistance is a very bad idea. Experienced middle managers are the backbone of any organization, and they are collectively, and in some cases individually, the most complete repository of an organization's accumulated experience and wisdom. Their opinions should be solicited and given due deference, not stifled. The FAA's experience—the huge cost and schedule overruns it endured—demonstrates the folly of pressuring people to stifle full and frank discussion of acquisition issues. If experienced middle managers have reservations about acquisition reform efforts, that should give us pause, that should be a cause for disquiet—not out of concern about their loyalty or about whether they are team players, but out of concern about the wisdom of these reforms when viewed from the perspective of their experience. We owe the professional managers, and the acquisition process would benefit from, respectful consideration of their views, even those views which are unpopular, inconvenient, or at odds with the course their leaders may wish to take.

Entrepreneurialism as an Acquisition Reform

The statistics for calendar year 1997 have not all been digested, but informal data indicates that the total number of GAO protests is down (probably proportionally to the total number of procurements) and that the overall percentage of cases in which protests are sustained appears to be unaffected. However, available information suggests that outcomes which are favorable to protesters and adverse to the government are on the rise in at least one area—protests of information technology (IT) procurements.

Preliminary 1997 data[27] shows the following about IT protests:

> Relief favorable to the protester was obtained in about thirty percent of the cases. [28]

> For all cases *filed*, about sixty-four percent were dismissed (voluntarily or involuntarily), and thirty-six percent were decided.

In cases which were *dismissed*, the protester obtained relief in about thirty-four percent.

In cases which were *decided*, about twenty percent were sustained.

Those percentages all appear to reflect substantial increases in outcomes that were favorable to protesters. For example, the twenty percent rate at which IT protests were sustained in 1997 stands in stark contrast to the twelve or thirteen percent rate at which the GAO has sustained protests overall in recent years. [29]

If the rate at which these protests are sustained is rising, why is that happening? The likely cause is that the elimination of rules and guidelines and the accompanying exhortation to be "entrepreneurial" are inducing agencies to make contracting mistakes. If that hypothesis is correct, if the present emphasis on aggressively entrepreneurial contracting contributes to contracting errors, acquisition reform is increasing disruption of procurements because it is increasing the number of instances in which corrective action is required.

Protest decisions, particularly those that reflect attempts to avoid contracting constraints, over time will provide an objective metric regarding the merits of reform. Early indications are that this metric will show that entrepreneurialism may have gone too far.[30]

Electronic Contracting as an Acquisition Reform

One endeavor regarding which plenty of measurement data exists but has been disregarded is government-forced electronic contracting. The DOD recently committed itself, and all of us, to contracting for major systems on a paper-free basis within three years.[31] This despite the fact that the DOD's experience with forced automation has been unsatisfactory, to say the least.[32]

The Federal Acquisition Streamlining Act of 1994 created a federal acquisition computer network (FACNET) to do business electronically for contracts between $2500 and $100,000.[33] The purpose of FACNET, like the current elec-

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27. *See infra* Appendix (compiling informal data available through September 1997).

28. This includes cases in which the protests were dismissed but corrective action was taken by the agency, as well as protests that were decided favorably to the protester (31 + 10 = 41; 41/141 = .29078). The GAO calls this percentage the "effectiveness rate."

29. Specifically, the 20% "sustain" rate is *fifty percent* higher than the historical overall percentage of cases in which the GAO sustained protests. *See infra* Appendix. Moreover, if IT protests are removed from the overall 1997 statistics, IT protests were sustained at nearly twice the rate that other protests were (20% versus 11%). *See id.*

30. *See, e.g.,* CCL, Inc. v. United States, No. 97-721C, 1997 WL 790570, at *17 (Fed. Cl. Dec. 23, 1997) (holding that the government's proposed use of an indefinite delivery indefinite quantity contract far exceeded its legitimate bounds). The government had carried innovative contracting too far.

31. Charles Aldinger, *U.S. Plans to Cut Military Bureaucracy*, REUTERS, Nov. 11, 1997; *Study Seeks More Base Closings*, FLA. TIMES-UNION, Nov. 11, 1997, at A1.

32. *Information Management and Technology,* GAO/HR-97-9, Feb. 1997, at 6. "During the past 6 years, agencies have obligated over $145 *billion* building up and maintaining their information technology infrastructure. The benefits of this vast expenditure, however, have frequently been disappointing." *Id.* (emphasis added).

tronic contracting initiative, was to move the government's contracting process away from paper, but it has been "a failure."[34] Despite a massive investment in the effort, the GAO reported that less than two percent of the procurements in the FACNET dollar range were accomplished through the network.[35] Those actions which were conducted using FACNET were slower, more expensive, and less reliable than processing them using the old, pre-reform methods. "Government and industry FACNET users reported hundreds of malfunctions in sending and receiving FACNET transactions."[36] They also reported "[l]ost, late, and duplicate transactions, and network interruptions frustrated agencies . . . and vendors and delayed procurements."[37] According to the GAO, using FACNET takes longer and costs more than traditional, pre-reform procurement methods.[38] One commentator put it this way: "As for the paperless office, everybody can see this brass ring, but it's never there when you grab for it. As urban myths go, it ranks down there with New York City's sewer alligators."[39]

Even if the cynics are wrong and this newest campaign for paperless contracting will eventually bear some fruit, there is a more important problem we should consider.[40] A fundamental tenet of acquisition reform is that unique and burdensome mandates by the federal government should be avoided because they are expensive, time-consuming, and adversely affect procurement outcomes. Paperless contracting, especially if forced on the proposed schedule, is precisely the kind of burdensome mandate that should be avoided for exactly those reasons.

Contracting on a paperless basis can be achieved, if at all, only if contractors make dramatic changes to the way they do business, to accommodate the DOD's demands.[41] Moreover, if a contractor changes its practices to suit the DOD, all of the contractor's trading partners (prime contractors, subcontractors, suppliers, vendors, and the like) also have to switch to electronic contracting, or the contractor will have to have *two* billing systems—one to meet the DOD-imposed requirement and one for its other business.[42] The government is not simply switching horses, but rather is demanding that everyone else add horses.[43]

Paperless contracting will be neither inexpensive nor easily done. What will it cost? Who will pay for it? What will be the net benefit?[44] These questions, and a host of others, should have been answered before paperless contracting was touted as an acquisition reform. If we neglect to answer these questions, we risk investing years of effort, money, and opportunity cost

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33. Pub. L. No. 103-355, 108 Stat. 3243 (1994).

34. *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network,* GAO/NSIAD-97-232, Sept. 1997; Matthew Phair et al., *Buying and Selling Go On Line,* ENGINEERING NEWS-REC., Oct. 27, 1997, at 26.

35. *Acquisition Reform: Obstacles to Implementing the Federal Acquisition Network,* GAO/NSIAD-97-26, Jan. 1997, at 2-3; *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network,* GAO/NSIAD-97-232, Sept. 1997.

36. *Acquisition Reform: Obstacles to Implementing the Federal Acquisition Network,* GAO/NSIAD-97-26, Jan. 1997, at 7-8.

37. *Id.*

38. *Id.* at 13. Notwithstanding abysmal performance, the "DOD stated [that] FACNET use will continue, even if a current congressional amendment repeals its mandated use." *Acquisition Reform: Classes of Contracts Not Suitable for the Federal Acquisition Computer Network,* GAO/NSIAD-97-232, Sept. 1997.

39. *Being Taken for a Ride,* PRESS-ENTERPRISE [Riverside, California], Nov. 17, 1997.

40. Other issues are also apparent. For example, paper documents will not be available as a "backup" if automated systems fail, and the potential for malicious interference with electronic records is substantial. In May 1996, the GAO reported that "defense systems may have experienced as many as 250,000 attacks during 1995, that about 64 percent of attacks were successful at gaining access, and that only a small percentage of these attacks were detected." *Information Management and Technology,* GAO/HR-97-9, Feb. 1997, at 34.

41. *Defense Watch,* DEF. DAILY, Dec. 8, 1997 (reporting that, for the Pentagon to meet its ambitious goal of introducing paper-free contracting, the defense industry must be willing to make changes to their own operations so that the Pentagon can make contract payments electronically); William Jackson, *HHS Tries Buying on the Web,* GOV'T COMPUTER NEWS, Sept. 8, 1997 (stating that a principal reason for FACNET's failure was "the vendors wouldn't buy in. The vendors said, 'I'm not going to pay to be EDI-capable when I only get one or two solicitations a month.").

42. *See DOD News Briefing,* M2 PRESSWIRE, Dec. 11, 1997 (paraphrasing remarks by Dr. Hamre).

43. *See* Phair et al., *supra* note 34.

44. Experience suggests that electronic contracting may produce a net detriment, not a benefit. A U.S. Army Missile Command study revealed that:

> [T]he use of FACNET prolonged procurement processes . . . from an average of 3 days to more than 7 days and required extra resources and effort . . . . [T]he cost in time and effort far overshadows any small savings FACNET produces. The Department of the Interior performed a similar test at five buying locations and got comparable results.

Id. at 13.

in "vaporware," like FACNET, that will take longer, cost more, and be less efficient than current, unreformed procedures.

Scoring Contractors' Performance as an Acquisition Reform

Another area in which we are investing in reforms of questionable value is the collection of "past performance information." Moreover, with regard to past performance information, the reforms appear to be complicating, rather than streamlining the acquisition process—making matters worse, rather than better.

A November 1997 policy requires the DOD to collect past performance information regarding contractors in accordance with a specified procedure.[45] The DOD procedure for doing so divides contract work into various "business sectors" and establishes differing contract dollar thresholds above which information is to be collected according to a number of "assessment elements."[46] Neither the content nor the boundaries of the "business sectors" are obvious or readily discernible. Neither the dollar thresholds nor the "assessment elements" are uniform across all the business sectors. For example, a $1,000,000 threshold applies to the information technology sector, a $5,000,000 threshold applies to the operations support sector, and a $100,000 threshold applies to the health care sector.[47] Similarly, an assessment element called "business relations" *is* to be used for information technology sector contracts, but it is *not* to be used for systems sector contracts.[48] All of this imposes a major, new learning task on government contracts professionals, and it will generate a substantial amount of additional work for everybody.

Effective 1 February 1998, every DOD contract will have to be categorized by "business sector," measured against the applicable dollar threshold, and, if a contract is over the threshold, data collected and reported for every one of the attendant "assessment elements." This process will be confusing, at least in the near term, and will be a major pain in the neck. Good luck trying to explain to your clients how this streamlines acquisition.

The major flaw in this guidance is not that it is complicated or causes more work, but rather that it misses, or at least does not address, what ought to be the most important point. We are, or should be, interested in *past* performance primarily because we believe we can use it to predict *future* performance[49] (for example, we believe that suppliers who produced higher quality products in the past will produce higher quality products in the future). Accordingly, data regarding performance in a previous task is useful to us only if it is a reliable predictor of future performance.[50]

Reliability of data regarding performance in a past task as a predictor of performance in a future task depends fundamentally upon the similarity of the past task to the future task. Yet, the new guidance concerning collection of past performance information groups work in categories that are too broad to be helpful and compares past performance not against the desired future performance, but solely against the requirements of a (not necessarily comparable) past contract. It does not focus the inquiry on the similarity of the past and future tasks, and so it will be of questionable reliability as a predictor of future performance. As a consequence, this new policy will require the DOD to collect past performance information that may be useful only accidentally.

Similarly, this guidance does not distinguish between difficult tasks and relatively easy ones. This procedure gives no points for difficulty. In fact, the reverse may be true; the scoring may *subtract* points for difficulty. For example, because in this scoring regime contractors' performance is measured against their contracts' terms, not against the difficulty of their respective tasks, a contractor that struggled with, learned from, and ultimately succeeded at difficult tasks in contract A likely will receive lower scores than a contractor that easily performed much less difficult tasks in contract B. To use a sports analogy, this scoring will tell us how easily a contractor got over the bar, without telling us how high or low the bar was.

In addition, this policy may institutionalize the kind of favoritism that critics have cautioned against. For example, the "business relations assessment element" mentioned earlier will permit government personnel to evaluate, and potentially to award, contracts based on a "contractor's history of . . . cooper-

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45. Memorandum, Under Secretary of Defense for Acquisition & Technology, subject: Collection of Past Performance Information in the Department of Defense (Nov. 20, 1997) [hereinafter Past Performance Memo] (located on the internet at <http://www.acq.osd.mil/ar/doc/collect.pdf>). *See Gansler Calls for Tailoring Collection of Contractor Performance Information*, Daily Rep. for Executives, Dec. 4, 1997, at A11-12.

46. Past Performance Memo, *supra* note 45.

47. *Id.*

48. *Id.*

49. *See* Office of Federal Procurement Policy, Policy Letter No. 92-5, Dec. 30, 1992 (stating that "[a] contractor's past performance is a key indicator for predicting future performance"); *see also* Naval Command, Control, & Ocean Surveillance Center, Contracts Standard Operating Center Procedure No. 108, Oct. 16, 1996.

50. *See* Benjamin D. Wright, *A History of Social Science Measurement* (MESA Psychometric Laboratory, University of Chicago 1997) ("Our interests are not limited to the data in hand, but go to what these data imply about other unknown data."). This source is located only on the internet at <http://mesa.spc.uchicago.edu/memo62.htm>.

ative behavior."[51] Given this assessment factor, award of a contract may be based not on the quality of a company's goods and services, but based on its relationship with the contracting officer. This could lead to exclusion of valid and worthy proposals and facilitate the funneling of contracts to a favored few.[52]

In a 1997 study by Coopers & Lybrand, use of past performance information in selecting contractors—a reform that was undertaken to produce higher quality products and services—was rated as having *zero* impact on quality.[53] This is despite the fact that the use of past performance is already one of the most fully implemented of the recent acquisition reforms. The use of past performance data has zero effect on quality because the data collected is not a reliable basis for inferences regarding future performance, for the reasons discussed above.

That is not to say that collecting data regarding contractors' past performance is an idea without merit; it is, however, an idea that, thus far, has been poorly executed. This criticism, being in essence that the measurement mechanism is ineffective, should be recognized by the DOD because (as discussed above) the DOD resists attempts to measure its *own* performance on the ground that the people who want such measurements "are busy as hell coming up with just a . . . meaningless metric."[54]

Globalization of Our Industrial Base as an Acquisition Reform

Simultaneous with its other initiatives, the DOD has apparently decided that the U.S. industrial base should be "globalized" as an acquisition reform measure.[55] In recent speeches, writings, and testimony, the DOD's leaders have taken the position that "international teams" should bid for U.S. contracts to build new systems or to provide major upgrades of current systems.[56]

This calls to mind what someone said about second marriages, that they are a triumph of optimism over experience. Globalization of U.S. acquisition is another area in which optimism has drawn the United States in directions at odds with its experience. An economic or operational case for multinational development of weapon systems is difficult, if not impossible, to support with facts.

The principal argument for "globalization" of U.S. defense procurements is that our allies' equipment should be interoperable with ours.[57] Indisputably, interoperability is highly desirable for coalition operations. However, the theory that armaments cooperation will create interoperability is contradicted by real-world experience.

The history of U.S.-allied armaments cooperation shows that it has been significantly more expensive to collaborate internationally in developing new weapon systems than to go it alone.[58] Furthermore, collaboration, despite its increased cost, has produced negligible improvements in interoperability, if any.[59] After fifty years of repeatedly trying, we are optimistic that we have figured out how to make meaningful strides in achieving interoperability by shouldering the extra costs of developing armaments multinationally, but such optimism does not appear to be warranted.

The fact is, while interoperability is a valuable goal, the United States usually achieves it *without* joint development. We become interoperable by exchanging necessary interface data (for example, wave forms and encryption data). We become interoperable when we and friendly nations buy the same equipment; Saudi Arabia bought our M1 tank, for example.[60] We become interoperable when we license production of the same equipment, such as U.S. 120mm tank gun ammuni-

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51. Past Performance Memo, *supra* note 45.

52. *See* Allan V. Burman, *Will Rule Changes Go Too FAR?*, Gov't Executive, Sept. 1997 (paraphrasing concerns of the U.S. Chamber of Commerce regarding Federal Acquisition Regulation Part 15).

53. *Acquisition Reform Implementation: An Industry Survey,* Coopers & Lybrand/Syracuse Research Corp. (Oct. 1997).

54. Roundtable, *supra* note 2 (remarks attributed to Mr. Money).

55. The DOD-driven internationalization of the U.S. industrial base is an old, unsuccessful idea. The proposal that it now should be called "globalization" and be championed as an acquisition reform lends itself to the criticism that everyone in the government who has an idea that they could not sell before now calls it acquisition reform in an effort to find a receptive audience.

56. *See, e.g.,* Jacques S. Gansler, Under Secretary of Defense for Acquisition & Technology, Address to the Aerospace Industry Association (Nov. 21, 1997). This address is available on the internet at <http://www.acq.osd.mil/ousda/speech/modernization.html>.

57. *Id.*

58. Thomas A. Callaghan, Jr., *Pooling Allied and American Resources to Produce a Credible, Collective, Conventional Deterrent,* DOD Cont. Rep. No. MDA-84-C-0274, at 4 (Aug. 1988) ("With very few exceptions, cooperative projects have cost more than national projects, thus consuming more Alliance [NATO] resources than they have conserved.").

59. *Id.* ("The ability of Alliance forces to operate together has been only marginally improved, if at all.").

tion, which we produced under a license from a German company.[61] All of these methods achieve interoperability and do so without joint development and without an "international team" bidding for the contract and the work.

In addition to interoperability as a reason for globalization of the U.S. industrial base, a DOD leader recently said:

> The United States will get more defense capability for its acquisition dollars *without any reduction in domestic labor content*. Each country will receive roughly the dollar value of its development and production program in proportion to the dollars that it invests in the effort. The U.S. gains the direct benefits of an international cooperative program while suffering no labor content loss.[62]

Those assertions and that theory are at odds with U.S. experience and U.S. interests.

First, the claim that it is cheaper to produce a military system through multinational collaboration, rather than by doing it entirely ourselves, is ill founded. As discussed above, it has virtually always cost us more to collaborate than it would have to develop and to produce a system on our own.[63] Moreover, if we do it ourselves, *we* control the schedule, the cost, the performance trade-offs, and the exports to countries whose interests may, or may not, be aligned with our own.

Second, the proposition that work share will be proportional to cost share, which here is held out as a *good* idea, is a proposition that the United States previously had resisted as a *bad* idea, because it means a nation that puts up one-third of the money will do one-third of the work, regardless of the capability of its industry and heedless of the impact on the system being developed. That might impair U.S. interests. Specifically, linking work share to cost share might require the United

States to impair its military capability by lowering system performance requirements or manufacturing quality standards in order to find work that a contributing nation's industry can perform.

Third, heretofore the U.S. position has been that work should be allocated based solely on *merit*, based solely on the value offered by the competing contractors. The fact that the United States historically has taken the position that contracts for joint development should be awarded based on merit, together with the fact that U.S. contractors frequently have won the lion's share of the work, sometimes has meant that the United States received *more* of the work than its share of the cost alone would justify.[64]

Finally, if the United States builds a system by itself, it can do *all* of the work and keep *all* of the jobs. But, if the DOD develops and produces a system cooperatively, rather than independently, on the terms that the DOD now proposes, it will export work and jobs that otherwise would remain in the United States.

There are numerous other issues regarding globalization that should be addressed,[65] but we cannot discuss all of them here. Hopefully, it will suffice to say that any policy of globalization of the U.S. industrial base, including globalization "encouraged" in U.S. government RFPs, should be the subject of a public report by disinterested experts after an objective all-sources review and before the policy is implemented.[66] So far, the public discussion (to the extent that there has been any) regarding globalization of the U.S. industrial base appears to have been one-sided and less than complete.[67]

Stabilizing Program Funding as an Acquisition Reform

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60. As another example, the Foreign Comparative Testing program has allowed the DOD to avoid development costs and simultaneously to achieve interoperability by buying $3 billion worth of foreign-developed equipment. *See Fiscal Year 1997 DOD Acquisition and Technology Program: Hearings Before the Subcomm. on Acquisition and Technology of the Senate Comm. on Armed Services*, 104th Cong. (1996) (prepared statement of Dr. Kaminski). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

61. The company was Rheinmetall GmbH.

62. Gansler, *supra* note 56 (emphasis in original).

63. Callaghan, *supra* note 58, at 4.

64. For example, U.S. contractors might have 90% of the work even though the United States contributed only 50% of the funding.

65. For example, what are the consequences of transferring technology to other nations? Why train our industry's global competitors? Why turn potential customer nations into competitors? What obligations continue to hamstring the United States even after withdrawing from a multinational development program?

66. Process action teams, auditors, and others have studied internationalization/globalization of acquisition. However, reports—the results of which were less than laudatory—appear to have been suppressed.

67. Participants in international acquisition programs, like those in other acquisition programs, have powerful incentives for undue optimism, chauvinism, and compromises of good judgment. *See Weapons Acquisition: A Rare Opportunity for Lasting Change,* GAO/NSIAD-93-15, Dec. 1992, at 35. Because of those incentives, problems attendant to international system development generally are not publicly disclosed, even if they are privately acknowledged.

Whatever the benefits of recent acquisition reform proposals have been, those "benefits . . . pale in comparison to cost growth from program instability."[68] A principal recommendation of the Packard Commission in 1986 was radical reform of the planning, programming, and budgeting process. This recommendation has largely been ignored; at the least, it has not been implemented.[69]

It is routine for a multi-year program to be approved with all of the decisionmakers concurring that it has been streamlined and reformed and that the amount budgeted for the program is the minimum necessary to properly execute the program. Yet, within a year, the program may be ordered to be "stretched" to accommodate competing priorities.[70] Operation and maintenance funds (O&M) are "underfunded" every year, resulting in money being taken from acquisition accounts to pay for O&M. During the budget process, "horizontal cuts" of a certain percentage are made across the board annually, without regard to program impact. Huge amounts of money are taken from acquisition accounts to pay for contingency operations, like Somalia.

All of this causes tremendous instability in program funding and execution. Usually it causes shifts of programs "down and to the right" in an attempt to achieve near-term cost reductions.[71] But those near-term reductions significantly increase long-term cost and delay the deployment of the affected systems.[72]

The numbers used to describe the cost of these profound program changes vary, but, broadly speaking, the impact is about three to one.[73] That is to say, there is an ultimate cost of about three dollars for every one dollar "saved" in the near term by reducing and delaying a program. Of course, that dollar is not really saved, it is borrowed—borrowed at an interest rate of 200%.

What that means is that if $2 billion are taken from acquisition programs in order to pay for one year's unfunded contingency operations in places like Bosnia, the ultimate cost to the taxpayers of America will not be $2 billion, but likely will be on the order of $6 billion.[74] The reforms that have been implemented to improve the acquisition process are inadequate to recover such costs. As the 1997 report of the Defense Acquisition Pilot Program Consulting Group put it: "Funding stability is key to achieving effective program management . . . . Instability obviates performance gains and rapidly *erases* any process efficiency gains associated with acquisition reform."[75]

There is a lot of discussion about having the federal government act more like a civilian business. What would happen to a civilian board of directors that borrowed billions of dollars at 200% interest—and knowingly did that year after year?[76]

Funding instability is a "big ticket" item.[77] We know what its costs are. We know what its causes are.[78] We know it happens every year.[79] Why do we let it continue?

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68. Briefing Slides, Under Secretary of Defense for Acquisition & Technology, subject: Acquisition Program Stability, slide 3 (undated) [hereinafter Briefing Slides]. The slides are available on the internet at <http://www.osd.mil/api/speech/peosyscom>.

69. *See* Roundtable, *supra* note 2 (remarks attributed to Mr. Douglass).

70. *See id.* (remarks attributed to Mr. Gilbert F. Decker, Assistant Secretary of the Army for Research, Development, & Acquisition).

71. *See Pentagon Reforms Spark Concerns,* AVIATION WK., Nov. 17, 1997, at 31 (stating that other costs force acquisition spending to slide to the right every year).

72. Briefing Slides, *supra* note 68, slide 5. "In addition to the higher unit costs caused by program stretchouts, another downside to the affordability issue is [the] DOD's potential inability to address valid requirements when available resources are consumed on questionable priorities." *Defense Weapon Systems Acquisition,* GAO/HR-97-6, Feb. 1997, at 37. Moreover, actions that delay system deployments put lives at risk. *See Fiscal Year 1996 DOD RDT&E Program: Hearings Before the Subcomm. on Research and Development of the House Comm. on National Security,* 104th Cong. (1995) (prepared statement of Dr. Kaminski) ("lives of our soldiers, sailors, marines, and airmen may depend upon shortened acquisition cycle times"). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

73. Roundtable, *supra* note 2 (remarks attributed to Dr. Kaminski) ("When we took out one dollar because of financial pressures, we ended up putting $3 back in.").

74. *Id. See Future Years Defense Program: DOD's 1998 Plan Has Substantial Risk in Execution,* GAO/NSIAD-98-26, Oct. 23, 1997, at 5-6 (reporting that the DOD expects that "migration" of funds from planned procurements to unplanned expenditures will be as much as $10-$12 billion).

75. DOD PILOT PROGRAM CONSULTING GROUP, CELEBRATING SUCCESS: FORGING THE FUTURE 2 (1997) [hereinafter DOD PILOT PROGRAM] (emphasis added).

76. In this context, financial audit reports have found:

> significant deficiencies across the spectrum of [the] DOD's financial management and reporting operations. None of the financial statements prepared by the military services or major DOD components have yet been able to withstand the scrutiny of a financial audit statement . . . . [T]he DOD Inspector General has stated that auditable financial statements for the Department would not be likely until the next century.

Defense Financial Management, GAO/HR-97-3, Feb. 1997, at 16.

77. If the DOD conducted a survey of every program management team in all four services, most respondents to the survey would identify program instability as the biggest problem. Roundtable, *supra* note 2 (remarks attributed to Mr. Douglass).

The DOD recently announced that it will fire 28,000 more civilian employees as part of its re-engineering of acquisition.[80] This zeal to fire people is reminiscent of a comment by Tom Peters, the author of *In Search of Excellence* and, most recently, *Circle of Innovation: You Can't Shrink Your Way to Greatness*: "[J]ust look at what happened to 're-engineering'—a great concept that became a euphemism and an excuse for bumping people off."[81] Why not attack funding instability instead of firing thousands of government employees?[82]

The DOD is considering initiatives to stabilize the funding for programs. These include proposals aimed at: (a) establishing a management reserve at the Office of the Secretary of Defense level (to cover "technical/uncertainty risk"); (b) fully funding O&M for required mission-capable rates; and (c) linking program decision milestones and the budgeting process to ensure that program "milestone" approval is funding approval.[83] These initiatives should include "fenced" funding dedicated to operational contingencies[84] so that acquisition accounts will not continue to be robbed[85] to pay for operations that Congress declines to fund.[86]

Reuters has reported that the savings from all of the presently planned "business reforms" plus the savings from firing 28,000 people are expected (if all of the hoped-for cost reductions are realized)[87] to reach about $3 billion.[88] If program funding can be stabilized, more than twice that much can be saved[89]—more than $6 billion a year—without firing anyone and without taking into account whatever modest savings we may eventually realize from the myriad "business reforms" that are presently being pushed.

If we are serious about acquisition reform, we should focus on the big ticket items. Moreover, we should postpone firing people and should postpone radical changes of the acquisition system that produced the most capable military in the world,

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78. QDR, *supra* note 18. The primary source of instability in the DOD's acquisition plans is diversion to other activities of funding planned for procurement. The chronic erosion of procurement funding has three general sources: unprogrammed operating expenses (including contingency operations), unrealized savings from acquisition reform, and new program demands. *Id.*

79. William S. Cohen, Remarks at the Center for Strategic and International Studies (May 22, 1997) ("[Y]ear after year, procurement funds have been taken to pay for unexpected operations and support costs.").

80. *DOD News Briefing*, M2 PRESSWIRE, Nov. 21, 1997 ("those are absolute eliminations"); Bradley Graham, *Cohen Sets Major Pentagon Overhaul*, WASH. POST, Nov. 10, 1997, at A1. Note that the GAO reported that the DOD has already cut 20,334 more acquisition positions than legislative mandates require. *Defense Acquisition Organizations: Reductions in Civilian and Military Workforce,* GAO/NSIAD-98-36R, Oct. 23, 1997, at 2.

81. Anne Fisher and Tom Peters, *Smart Managing*, FORTUNE, Dec. 29, 1997, at 274.

82. The DOD has promulgated the 12 acquisition goals that "will constitute the hallmark of what [the DOD] will achieve during the second term of this administration." National Performance Review Memo, *supra* note 16. One of those explicit goals is "reducing the DOD acquisition[-]related workforce by 15%." *Id.* Firing people is a dubious hallmark.

83. DOD PILOT PROGRAM, *supra* note 75, § 8.1. The GAO has made similar recommendations; for example, "link program decisions in a more durable way to [the] DOD's long-term budget." *Defense Weapon Systems Acquisition,* GAO/HR-97-6, Feb. 1997, at 37.

84. A proposal for a reserve to cover unfunded contingencies has been rejected by the DOD. *See* Minutes, Acquisition Reform Senior Steering Group Meeting (Aug. 12, 1997) ("The SECDEF [Secretary of Defense] vetoed the contingency reserve.").

85. QDR, *supra* note 18 (noting that "the key . . . is to halt the chronic disruption to [procurement] plans").

86. Last year, the DOD began asking Congress to fund "planned" operations in Bosnia and Southwest Asia. *See Fiscal Year 1996 DOD RDT&E Program: Hearings Before the Subcomm. on Research and Development of the House Comm. on National Security*, 104th Cong. (1995) (prepared statement of Dr. Kaminski). Dr. Kaminski's statement is available on the internet at <http://www.acq.osd.mil/ousda/archives.html#Testimonies>.

87. In 1996, the GAO reported that the DOD's "Reducing Oversight Costs Reinvention Laboratory," which was established in September 1994 to reduce the *18%* regulatory premium disclosed in the 1994 Coopers & Lybrand/TASC study, could yield estimated savings of $119 million (about a *one percent* savings). *See Acquisition Reform: Efforts to Reduce the Cost to Manage and Oversee DOD Contracts,* GAO/NSIAD-96-106, Apr. 18, 1996, at 5. The DOD responded by saying that the projected one percent savings were a "work in progress" and that to conclude, as the GAO had, that "savings [might] be less than estimated" was "pure speculation." *Id.* at 5-6, 11. A follow-up study reported that "[o]nly a small portion of the projected potential cost reductions . . . ha[d] been realized" as of July 1996. *Acquisition Reform: DOD Faces Challenges in Reducing Oversight Costs,* GAO/NSIAD-97-48, Jan. 29, 1997, at 12. Specifically, only $11 million in cost reductions had been achieved—about one tenth of the GAO's estimated potential one percent savings. *See id.*

88. Aldinger, *supra* note 31 (reporting that "Defense Secretary William Cohen announced a drastic plan to cut 28,000 jobs from the U.S. military's civilian bureaucracy and [to] make business reforms to save $3.2 billion for arms modernization"); *but see Acquisition Reform: Effect On Weapon System Funding,* GAO/NSIAD-98-31, Oct. 1997, at 2 ("[O]ur review raises concerns about the extent to which cost reductions from acquisition reform that the services have reported will be available to fund [the] DOD's modernization program . . . .").

89. Over the five years from 1992 through 1996, an average of $2.5 billion was required every year to pay for contingency operations. *See Defense Acquisition Reform: Hearings Before the House Comm. on National Security*, 105th Cong. (1997) (statement of Dr. Kaminski). Procurement accounts were reduced by an annual average of $7.6 billion during that period. Briefing Slides, *supra* note 68, slide 18. *See* Roundtable, *supra* note 2 (remarks attributed to Dr. Kaminski regarding the three-for-one impact of taking money out of the F-22 procurement program).

until we have exhausted other methods for getting the savings we think we need. Stabilizing funding is an achievable, high-payoff reform that should be the primary goal of acquisition reform efforts.

Conclusion

Let me conclude by retelling a story originally told by Assistant Secretary of the Navy John Douglass. While taking a turn staffing the phones during an Acquisition Reform Week activity, he answered a call by saying "Navy Town Hall."[90] The caller said, "My suggestion is that you all ought to knock off this acquisition reform baloney and get back to your desks and get back to work."[91] The caller insisted that his suggestion be taken personally to Secretary Douglass. When Secretary Douglass told the caller that he was Secretary Douglass, there was a long pause followed by a "click" when the caller hung up.

The caller's description of acquisition reform as "baloney" is inapt, but the story does illustrate two valid points. First, the business of acquisition reform should be *acquisition*, not reform, and acquisition has been served by a dedication to reliably *delivering the product* perhaps better than it now is served by endlessly *changing the process*. Second, people in the business of acquisition are afraid to confront their leaders about the wisdom of the present storm of reform.

We should heed that caller's advice and refocus our acquisition efforts. Rather than promiscuously chasing change, we should value constancy and predictability. We should permit reform-generated disruption of acquisition systems and programs only when disinterested evaluation discloses that the benefits of disruption will outweigh its costs. We should objectively identify and quantify the benefits and the costs of changes in the acquisition system before we undertake them. We should pick targets for change not based on the fact that an idea is "outside the box," but based on a pragmatic confirmation that a particular change will provide a worthwhile return on our investment.[92] We should eliminate the major sources of cost growth—first and foremost, funding instability—before we let anyone eliminate thousands more people. And we should *encourage* the critics of acquisition reform; they have contributions to make too, not the least of which are a counterbalance to the reformers' zeal and a reminder that acquisition reform is not an end in itself, that its purpose is to be a help, not a hindrance, in getting this nation's work done.

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90. Roundtable, *supra* note 2 (paraphrasing remarks attributed to Mr. Douglass).

91. *Id.*

92. As Nobel Prize nominee the late Professor Loh Seng Tsai said in lecturing on creative thinking, "It would be innovative to drink soup through your nose, but that wouldn't make it a good idea."

Appendix

General Accounting Office Bid Protests

ACTION ON INFORMATION TECHNOLOGY PROTESTS	1997 DATA	1997 RATES
Closed (total cases)	141	
Dismissed	90	
With corrective action	31	34.3%
Without corrective action	59	65.6%
Decided	51	
Sustained	10	19.6%
Denied	41	80.4%
Relief provided to Protester	41	29.1%

ACTION ON ALL PROTESTS	1997 DATA	1997 RATES	1996 DATA	1996 RATES
Closed (total cases)	2000		2335	
Dismissed	1502		1773	
With corrective action	?		512	28.9%
Without corrective action	?		1261	71.1%
Decided	498		562	
Sustained	61	12.2%	72	12.8%
Denied	437	87.8%	490	87.2%
Relief provided to Protester	?		584	25.0%